

SERVICE DATE - LATE RELEASE FEBRUARY 9, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42056

TEXAS MUNICIPAL POWER AGENCY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: February 9, 2001

In a verified complaint filed and served on defendant, The Burlington Northern and Santa Fe Railway Company (BNSF), on October 3, 2000, Texas Municipal Power Agency (TMPA or complainant) alleges that the rates to be assessed by BNSF on complainant's movements of coal from origins in the Powder River Basin of Wyoming to TMPA's steam electric generating facility near Carlos, TX, are unreasonably high.¹ Complainant alleges that BNSF possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed along with other relief.² Complainant also requests an award of reparations.

On December 1, 2000, complainant filed a motion to compel responses to certain interrogatories and document production requests. On December 7, 2000, complainant filed a petition for an order directing defendant to permit entry onto its property by TMPA to gather information on locomotive fuel consumption. Defendant replied on December 21 and 27, 2000, respectively. On January 5, 2001, complainant filed a second motion to compel, to which defendant replied on January 25, 2001.³

¹ The service is provided by BNSF under a rail transportation contract that will expire sometime between December 31, 2000, and March 31, 2001. The applicable rate will then be a trainload rate for movements in carrier-supplied cars (Common Carrier Pricing Authority BNSF-90042).

² TMPA seeks the prescription of a common carrier rate for unit-train movements in both carrier- and shipper-supplied cars.

³ The parties have classified their pleadings as highly confidential and filed them under seal, consistent with the protective order served on November 13, 2000. Accordingly, we limit our discussion to only those matters needed to decide the specific discovery issues.

DISCUSSION AND CONCLUSIONS

1. Documents subject to third-party confidentiality agreements.

Complainant's motions to compel pertain to its "First Set of Interrogatories and Requests for Admissions and Production of Documents," which it served on defendant on October 13, 2000, and to which defendant replied with objections on November 13, 2000.⁴ Four of complainant's production requests are aimed at documents that BNSF contends are subject to confidentiality agreements with third parties. Document Request No. 39 seeks the production of coal transportation contracts governing shipments of coal handled by BNSF over lines that also are part of the current route of movement for complainant's traffic; Document Request No. 42 seeks information pertaining to contractual train cycle-time standards for those movements; Document Request No. 85 seeks the mileage-allowance or other compensation terms governing the movement of private cars in that service; and Document Request No. 71 seeks documents pertaining to the valuation of land involved in specified line sales and abandonments.⁵

BNSF, in its reply to complainant's first motion to compel, acknowledges that discovery of relevant, confidential transportation contracts is appropriate, but assails the scope of TMPA's request. Furthermore, BNSF asserts that many of its confidentiality agreements with affected non-complainant shippers preclude disclosure without an order of the Board.⁶ BNSF also submits that these shippers should be afforded the opportunity to challenge the production of information relating to their specific arrangements. Finally, it notes that the protection accorded "highly confidential" information under the protective order should apply to these discovery materials.

In a letter filed January 16, 2001, TMPA states that it has reached an agreement with BNSF regarding the scope of shipper contract discovery and that BNSF has withdrawn its scope objection. It appears that BNSF notified its shippers of the possibility that their contracts would be disclosed. Four shippers submitted letters in opposition to this action, assailing the scope and relevance of the proposed disclosure and the sufficiency of the protective order in this proceeding to prevent competitive damage. While we understand the concerns raised by those shippers here, we are satisfied that the parties' agreements regarding scope and the application of the "highly

⁴ Defendant also produced certain responsive documents on November 29, 2000.

⁵ Document Request Nos. 39, 42, and 85 are the subject of TMPA's first motion to compel; Document Request No. 71 is the subject of the second motion to compel.

⁶ See PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42054 (STB served Nov. 9, 2000) (PPL Montana).

confidential” provisions of the protective order are sufficient to protect the interests of third-party shippers.

Likewise, BNSF, in its January 25 response, states that it does not oppose TMPA’s request for line-sale land valuations but is barred by confidentiality provisions from disclosing them without an order of the Board.⁷ Therefore, under the circumstances, an order to compel production is appropriate and will be issued, subject to the protective order. Similarly, TMPA’s requests for production of third-party confidential materials regarding contractual train cycle-time standards, and mileage-allowance or other compensation terms for private cars are reasonable and will be granted, subject to the protective order.

2. Information and documents regarding unit-train efficiencies.

In its discovery requests, TMPA sought data or documents showing the manner in which BNSF, in its cost calculations, adjusts system-average expenses of the type reported in its Annual Report Form R-1 to reflect efficiencies associated with unit-train service. Specifically, TMPA’s Interrogatory No. 5 seeks a description of the information used by BNSF to determine maintenance and operating costs for unit-train coal service; Document Request No. 36 seeks documents, broken down into nine cost categories, “sufficient to show” the information used by BNSF to make cost adjustments for unit-train service; and Document Request No. 37 seeks all such documents related to BNSF’s cost calculations for the movement at issue.

TMPA correctly notes that adjustments to a defendant carrier’s system-average costs are appropriate to reflect the economies and efficiencies that are associated with high-volume, repetitive movements such as the unit-train service at issue here. In response to BNSF’s objections that the discovery is burdensome and lacks relevance, TMPA contends that the information it seeks does not constitute an internal, proprietary costing system of the type that we have previously ruled unavailable for discovery.⁸

In reply, BNSF argues that TMPA is seeking discovery of information relating to BNSF’s

⁷ Although Document Request No. 71 pertains to the valuation of land involved in BNSF line sales and abandonments, TMPA is only seeking to compel the production of five specified line sale agreements that BNSF would not make available because of restrictive confidentiality clauses within the agreements.

⁸ Because our Uniform Railroad Costing System (URCS) is the exclusive methodology for developing costs in a rail rate complaint proceeding, proprietary costing systems are irrelevant. See Potomac Electric Power Company v. CSX Transportation, Inc., STB Docket No. 41989, et al. (STB served May 27, 1997); Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Company, STB Docket No. 42038 (STB served May 11 and July 8, 1999).

internal costing methodology. To the extent that this is not the case and TMPA is only seeking the adjustments to system-average operating costs, BNSF submits that it does not have the information.⁹ In light of BNSF's representation that the sought data do not exist, an order to compel production would serve no purpose. Because the only data that do exist are based on BNSF's internal costing methodology, TMPA's motion to compel responses to its interrogatory and the production of documents will be denied.

3. Entry upon railroad property to conduct fuel consumption studies.

Under 49 CFR 1114.30(a)(2), a party may seek entry upon the opposing party's land for the purpose of "inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon." On November 15, 2000, TMPA requested that BNSF permit TMPA's designated representatives to enter upon BNSF's property for purposes of measuring, testing, and sampling the consumption of fuel used by BNSF's locomotives in providing the service at issue. In response to a November 22, 2000 letter from BNSF requesting clarification, TMPA provided, on the same day, an outline of its proposed procedure, which, upon examination, BNSF found unacceptable. In a letter dated December 1, 2000, BNSF declined to allow the procedure. TMPA's December 7 petition for an order permitting the discovery ensued.

In its December 27 reply, BNSF contends that the Board's discovery rules do not permit the order TMPA seeks. Assertedly, the right to enter upon land exists for limited, non-intrusive purposes such as allowing an inspection of documents located there or of the property itself. BNSF relies on Philadelphia Belt Line Railroad Company v. Consolidated Rail Corporation, CP Rail System, and CSX Transportation, Inc., STB Finance Docket No. 32802 (STB served Mar. 1, 1996) (Philadelphia Belt Line).

In Philadelphia Belt Line, the Board denied a petition of the complainant to make a hi-rail inspection of a respondent carrier's facilities during business hours. In its decision, the Board balanced the need for the information against the burdens that the inspection would impose, ultimately finding that the petitioner had failed to establish the reasonableness of its request. Consistent with that decision, we will balance the burden and potential disruption that TMPA's proposal would impose on BNSF with TMPA's need for the information and the possibility of obtaining it through other means.

BNSF does not dispute the relevance of accurate fuel consumption data. TMPA submits

⁹ According to Nick Murray, BNSF's Assistant Vice President—Measures, Profitability & Operations Planning, BNSF's internal management cost system is not URCS-based and is not URCS-compatible. It does not develop system-average train movement costs and then make movement-specific adjustments, as TMPA suggests.

that fuel expenses are one of the principal components of BNSF's variable cost of providing service to TMPA. Noting that movement-specific costs are preferable to system-average costs where available, TMPA argues that it is also likely that the use of system-average costs overstates the fuel consumption rates for the modern, efficient locomotives used in high-volume, long-haul, unit-train coal movements such as TMPA's.¹⁰ Finally, the parties recognize that other, less intrusive means are unavailable. As noted in the verified statement of Warren A. Rugenstein, which was attached to BNSF's reply, BNSF does not measure fuel as it is dispensed to locomotives. This situation led to a discovery dispute in PPL Montana, wherein a complainant requested that BNSF be compelled to perform a special study of fuel consumption in service to complainant. We denied that complainant's request as beyond the scope of legitimate discovery. Here, because BNSF does not have movement-specific fuel consumption data and cannot be compelled to develop such data, TMPA proposes to gather the data itself.

TMPA proposes to monitor the fuel used by BNSF trains in TMPA service over 14 round trips, using a procedure purportedly similar to the procedure employed in San Antonio, TX v. Burlington Northern, Inc., 1 I.C.C.2d 561 (1986) (San Antonio).¹¹ Essentially, TMPA would install (or BNSF personnel would install at TMPA's expense) metering devices at the refueling locations identified by BNSF in discovery (or, if BNSF prefers, on locomotives), and a TMPA observer would monitor each refueling event.¹² Each cycle would begin with locomotives filled to capacity, and TMPA would record the amount of fuel added at each refueling stop. Locomotives removed from service would first be filled to capacity, and locomotives added would be placed in service with full tanks. If the locomotive change-out occurred away from a refueling facility, the train would be excluded from the study. TMPA estimates that it would require about 3 weeks to complete its observations.

In a verified statement attached to BNSF's reply, Bruce R. Gillaspie contends that the proposed study would require broad changes in BNSF operations and the extensive assistance of BNSF employees. Assertedly, hundreds of BNSF employees would have to be trained in the

¹⁰ An overstatement of fuel costs would result in an understatement of the revenue-to-variable cost ratio of the transportation at issue, which could in turn affect whether we have authority under 49 U.S.C. 10707(d)(1) to review the rates or the extent to which we can afford relief if the rates are found to be unreasonable.

¹¹ See verified statement of Frederick W. Yocum, Jr., attached to TMPA's petition.

¹² TMPA contemplates that BNSF would notify it of trains inbound for refueling. Failing this, TMPA is prepared to keep its observer on site full-time.

protocol of the study and collaborate in the collection of data.¹³ Personnel from the Fort Worth operating center would be needed (around-the-clock) to monitor the progress of the TMPA trains so that TMPA's monitors could be notified and fuel measurements could be taken when the trains arrive. Dispatching crews, division superintendents, trainmasters, and yardmasters would have to be notified (again, for each crew, around-the-clock) and prepared so that the individual locomotives could be identified, placed on appropriate tracks, and fueled according to protocol. All of the additional work and training would be outside of the normal responsibilities of these employees and would disrupt the performance of their existing duties. In addition, BNSF employees would be required to supervise and assist the TMPA monitor at each location, as well as to protect against exposing the monitor to trade-sensitive information. Mr. Rugenstein adds that any additional activity that is required of BNSF personnel at refueling points could delay the refueling queue and jeopardize the efficiency of the fueling operation and therefore the performance of BNSF's trains for many shippers across a large area.

Mr. Gillaspie also contends that TMPA's proposed study is fundamentally flawed because it fails to account for real operating conditions. In particular, TMPA's proposal does not account for BNSF's use of third-party vendors who provide locomotive fuel via trucks. Direct-to-locomotive truck refueling is used to fuel the rear locomotive, while the front locomotives are fueled at the fixed facilities, thereby avoiding repositioning the train. TMPA's proposal would thus require the cooperation of these third-party fuel vendors.

Finally, Mr. Gillaspie submits that locomotive change-outs occur frequently enough to undermine the validity of TMPA's proposed study. He has determined that, out of the 211 one-way trips that occurred between January 1, 2000, and October 31, 2000, a locomotive was changed 236 times in 49 different locations. Approximately two-thirds of the TMPA trains were affected by these change-outs. Accordingly, most TMPA trains would have to be excluded from the proposed study for incomplete data.¹⁴

¹³ The perceived scope of the necessary involvement of BNSF employees in the procedure is confirmed by Mr. Rugenstein, who states that he personally conducted the fuel consumption study that was the subject of the San Antonio proceeding. According to Mr. Rugenstein, that study required approximately 4 months' preparation to ensure that appropriate procedures and methodologies were in place and that all personnel who would be involved in the study understood the study's protocols. To that end, he personally conducted meetings with personnel on all three shifts, including supervisors, machinists, and laborers, to prepare them for the study.

¹⁴ Other purported shortcomings identified by Mr. Gillaspie do not merit consideration. It is inconsequential that locomotives are not identified for TMPA service until they have already been fueled, because no initial fuel measurement is required. It is only necessary that the
(continued...)

This is consistent with Mr. Rugenstein's experience in the San Antonio study. Mr. Rugenstein states:

TMPA has also made no attempt to account for the practical problems that would arise in a fuel measurement study of the type it proposes. One of the difficulties we encountered in carrying out the San Antonio study was that reliable data on complete cycles was often difficult to obtain because of unpredictable events, including problems with measurements, changes in operations, the switching in and out of locomotives along the route, difficulties installing and operating the fuel metering systems, and problems ensuring that the fueling protocols were followed. In fact, we conducted measurements on nearly 300 movements, but ended up with only about 100 movements with data for complete cycles.¹⁵

When applied to the 14 movements posited by TMPA, Mr. Rugenstein projects that only 4 or 5 cycles of usable data are likely to be obtained.¹⁶

BNSF contends not only that the proposed study is unreasonably intrusive and burdensome, and unlikely to lead to the discovery of admissible evidence, but that TMPA's proposal is tantamount to requiring that BNSF perform a special study, in that TMPA's sole role would be to record the locomotive fueling data.

We disagree. The proposed discovery, on its face, meets the requirement of 49 CFR 1114.30(a)(2), which permits entry upon an opposing party's land for purposes of "inspecting and measuring . . . any designated object or operation thereon." Philadelphia Belt Line does not hold otherwise. In that case, the proposed hi-rail operation, on a congested line during business

¹⁴(...continued)

locomotive be full at the start and end of its service, and that refueling in service be recorded. (Although TMPA proposes that locomotives be filled to capacity at each stop, this does not appear to be necessary for determining total fuel consumption for the round trip.) Additionally, the fuel used by helper locomotives is accounted for separately from road locomotives and is not included in the gross ton-miles or locomotive unit-miles accounts. Although not mentioned by Mr. Gillaspie, the same would be true of fuel used in switching operations.

¹⁵ See Rugenstein verified statement at 3.

¹⁶ Mr. Rugenstein further notes that, based on a 200-hour cycle time for the three train sets in TMPA service, TMPA would be able to evaluate only seven complete cycles in the allotted 3 weeks, resulting in as few as one or two cycles of data. It appears, however, that 3 weeks was simply TMPA's estimate of the time requirement; its request is for 14 cycles.

hours, would have disrupted the very operations it sought to measure, and other, less intrusive means were available to examine the line's layout. In contrast, TMPA's proposal, although inconvenient and even intrusive for BNSF, poses no such intrinsic paradox, and appears to be a last resort for TMPA.

Moreover, in balancing the interests of the parties, we must be guided by the relative burdens of granting or denying the requested relief. TMPA's explication of its need for movement-specific fuel consumption data is unassailable. It accurately notes that the use of system-average cost in the absence of better evidence is a recurring shortcoming in variable cost analyses, and that it has no alternative means of deriving movement-specific data. BNSF's burden evidence, although credible, is insufficient to overcome the merits of TMPA's discovery request,¹⁷ and its argument that TMPA's proposed methodology cannot yield reliable results goes to the weight to be accorded those results. On balance, we conclude that TMPA's discovery proposal should be permitted.

4. Procedural Schedule.

Finally, on February 5, 2001, TMPA filed a motion requesting an extension of the procedural schedule. Under TMPA's proposal, opening statements would be due 14 days after we rule on TMPA's motion to compel the production of information about the contracts between BNSF and certain non-party shippers. TMPA states that the information that it seeks in discovery is crucial to the presentation of its case, and that it will need 2 weeks to obtain, analyze, and incorporate the data into its presentation.

In this decision we are allowing TMPA to perform on-site fuel measurements, which the parties agree will likely be difficult and we believe could clearly not be completed in 2 weeks. Thus, it does not appear to us that a 2-week window from the date of this order will be sufficient to permit TMPA to complete its opening case in its entirety in a satisfactory manner. Because we do not believe that the fuel studies could be completed, analyzed, and fully incorporated into TMPA's opening statement within 2 weeks, and we do not consider new evidence submitted for the first time on rebuttal,¹⁸ we will suspend the procedural schedule until all discovery is

¹⁷ We disagree with BNSF's contention that the proposed discovery is a pretext for requiring BNSF to undertake the study. But we note that BNSF is free to mitigate the burden of cooperating with TMPA's discovery efforts by voluntarily conducting its own study in a manner agreeable to TMPA, at TMPA's expense.

¹⁸ See FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, STB Docket No. 42022 et al., slip op. at 25 (STB served May 12, 2000).

completed,¹⁹ after which the parties shall negotiate and jointly submit a new procedural schedule.

It is ordered:

1. TMPA's motion to compel production of coal transportation contracts and related cycle time standards and mileage allowance or other private car compensation terms is granted, subject to the agreement of the parties regarding scope and the application of the "highly confidential" provisions of the protective order.

2. TMPA's motion to compel production of documents related to the valuation of land involved in specified line sales is granted, subject to the protective order.

3. TMPA's motion to compel production of data or documents showing the manner in which BNSF, in its cost calculations, adjusts system-average expenses of the type reported in its Annual Report Form R-1 to reflect efficiencies associated with unit-train service is denied.

4. TMPA's motion to enter upon BNSF's property to conduct a fuel consumption study of 14 traffic cycles is granted, subject to the terms and limitations described.

5. The procedural schedule in this matter is suspended. As soon as discovery is completed, the parties shall negotiate and jointly submit a new schedule.

6. This decision is effective on its date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary

¹⁹ We note that TMPA filed a third motion to compel on February 7, 2001, which will likely require further Board action.